APPENDIX A

Filed August 10, 1994

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 93-2008 and 93-7613

UNITED STEELWORKERS OF AMERICA,
AFL-CIO-CLC

v.

CROWN CORK & SEAL CO., INC.,
Appellant
(In No. 93-2008)

CHARLES A. THOMAS; DARREN BOOP; ROBERT W. BOWER; WILLIAM D. BRIDGE; JAMES CLINGAN; NEAL B. HOUSNER; JONATHAN L. NOAKER; WAYNE D. ORNER; GERALD W. RANCK; HAROLD E. VAN SICKLE, JR.; RICHARD A. WINTER; EUGENE L. WITMER, SR.,
Appellants
(In No. 93-7613)

v.

NORTH STAR STEEL COMPANY

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 92-CV-05968)

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. No. 92-CV-01507)

Argued May 24, 1994

Before: Cowen and Roth, *Circuit Judges*
Ackerman, *District Judge* *

(Filed August 10, 1994)

OPINION OF THE COURT

ACKERMAN, *District Judge.*

These two cases present the following discrete issue: In an action brought pursuant to the Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2101 et seq. ("WARN"), a statute which, like so many others, fails to explicitly provide a statute of limitations, should we follow the general rule and borrow a state statute of limitations or should we instead opt for the six-month statute of limitations set forth in section 10(b) of the federal National Labor Relations Act. The two cases present the identical issue for review and we will consider both cases in this Opinion.

For the reasons detailed below, we find that for cases arising under WARN, courts should apply the most closely analogous state statute of limitations. Thus, we will reverse the decision in *Thomas v. North Star Steel*

*** Honorable Harold A. Ackerman, United States District Judge for the District of New Jersey, sitting by designation.**

and will affirm the decision in *United Steelworkers of America v. Crown Cork & Seal.*

Background

Both of the underlying cases were filed pursuant to WARN, a federal statute which requires companies with one hundred or more employees to provide their workers with a minimum of sixty days written notice before a plant closing or mass layoff.[1] Employers who fail to provide the requisite notice must compensate employees suffering an employment loss for each day of the violation. The statute creates a private civil action for damages in federal court.

On September 9, 1991, the United Steelworkers of America, AFL-CIO-CLC, filed a complaint in federal court alleging that the North Star Steel Company ("North Star") had violated the WARN Act by failing to give the union sixty days advance notice of a February 25, 1991 layoff of about 270 people, at the company's Milton, Pennsylvania plant. Although the suit was filed more than six months after the layoff occurred, North Star did not raise the statute of limitations as a defense. On April 9, 1992, the district court granted the union's motion for summary judgment on liability, holding that the layoff constituted a "plant closing" subject to WARN. In a separate Order, dated December 11, 1992, the district judge determined the number of days for which the company was required to pay WARN damages. *United Steel-*

[1] The statute defines "plant closing" as the permanent or temporary shutdown of a single site of employment, which results in an employment loss to a certain minimum number of employees. 29 U.S.C. § 2101(a)(2). "Mass layoff" is defined as a reduction-in-force, resulting from a plant closing, which results in a certain minimum employment loss. 29 U.S.C. § 2101(a)(3). A layoff must last more than six months before it qualifies as actionable under WARN, 29 U.S.C. § 2101(a)(6)(B).

workers v. North Star Steel, 809 F. Supp. 5, 6-7 (M.D.Pa. 1992), *aff'd* 5 F.3d 39 (1993).

Appellants were non-unionized employees of North Star, unrepresented by the union and hence unaffected by the union's successful lawsuit against North Star. They therefore filed a separate action, the instant case, also seeking damages pursuant to WARN. On May 25, 1993, the district court granted North Star's motion for summary judgment, finding that the action was barred under what it deemed to be the applicable statute of limitations. The employees' motion for reconsideration was denied on August 26, 1993. This appeal followed.

United Steelworkers of America v. Crown Cork & Seal Co., Inc. ("Crown Cork"), arises out of an event that took place on September 30, 1991. On that day, the company ordered a reduction-in-force and shutdown of its Perry, Georgia plant. As a result of this reduction in force, about 85 employees were terminated. On October 15, 1992, the United Steelworkers of America (the union) filed a complaint, alleging that the company violated WARN by failing to give it 60 days notice prior to the shutdown. Crown Cork & Seal then moved for summary judgment, contending that the action was barred by the applicable statute of limitations. The district court denied the motion on August 24, 1993 but in an order dated September 26, 1993, certified the August order for immediate interlocutory appeal pursuant to 28 U.S.C. § 1292.

We have jurisdiction over the appeal in *Thomas v. North Star Steel* pursuant to 28 U.S.C. § 1291. Our jurisdiction over *United Steelworkers of America v. Crown Cork & Seal* arises from our October 13, 1993 Order granting the company permission to appeal pursuant to 28 U.S.C. § 1292(b). Our review over both cases is plenary.

Discussion

In this case we visit a general question of federal law that we have repeatedly addressed: When a federal statute does not contain an explicit statute of limitations, when is it appropriate to borrow a statute of limitations from elsewhere in federal law rather than adopting the most closely analogous state statute of limitations.

The companies argue that in this case, a federal statute —the six-month statute of limitations contained in section 10(b) of the National Labor Relations Act ("NLRA") for filing a claim of an unfair labor practice with the National Labor Relations Board ("NLRB")—provides the most appropriate limitations period. The employees and the union exhort us to borrow one of various state statutes. Courts addressing the question have adopted both approaches. Some have borrowed the six-month § 10(b) statute; *see, e.g., Newspaper and Mail Delivers' Union of N.Y. and Vicinity v. United Magazine Co.*, 809 F. Supp. 185 (E.D.N.Y. 1992) (adopting NLRA statute); *Staudt v. Glastron, Inc.*, No. SA-92-CA-1174, 1993 WL 85356, 1993 U.S. Dist. LEXIS 3090 (W.D.Tex. February 23, 1993) (same). Other courts, including the only Court of Appeals to reach the question, have expressly considered and rejected the section 10(b) six-month period, instead opting for various state law limitations periods. *See, e.g. United Paperworkers Local 340 v. Specialty Paperboard, Inc.*, 999 F.2d 51 (2d Cir. 1992) (hereinafter *United Paperworkers*); *Wallace v. Detroit Coke Corp.*, 818 F. Supp. 192 (E.D. Mich. 1993) (rejecting NLRA statute and adopting six-year state contract statute); *Automobile Mechanics' Local No. 701 of the Int'l Assoc. of Machinists & Aerospace Workers v. Santa Fe Terminal Services, Inc.*, 830 F. Supp. 432 (N.D. Ill. 1993) (rejecting NLRA statute and adopting, without specifying, most analogous state statute).

The two district court opinions before us now reached contrary conclusions. The district court in *North Star*

Steel adopted the six-month statute of limitations set forth in § 10(b); the court in *Crown Cork & Seal* rejected the § 10(b) statute, and without deciding the appropriate statute of limitations, found the action timely under all of the possibilities.

Our analysis must begin with the general assumption that when a federal statute is silent as to a statute of limitations, the court should apply "the most closely analogous statute of limitations under state law." *DelCostello v. International Brotherhood of Teamsters,* 462 U.S. 151, 158 (1983); *see also Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson,* 501 U.S. 350, ——, 111 S.Ct. 2773, 2778 (1991); *Haggerty v. USAIR, Inc.,* 952 F.2d 781, 783 (3d Cir. 1992). This general rule is not set in stone, however. Rather, the United States Supreme Court has recognized that, in order to prevent frustration of federal policy, it is sometimes more appropriate to borrow a limitations period from an analogous area of federal law. *DelCostello,* 462 U.S. at 162. This exception is "closely circumscribed", *see Reed v. United Transp. Union,* 488 U.S. 319, 324 (1989), and should only be applied "when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking". *DelCostello,* 462 U.S. at 172.

In following the principles enunciated in *DelCostello* and *Reed,* we repeatedly have recognized our duty "to take seriously [the Supreme Court's admonition] that analogous state statutes of limitations are to be used unless they frustrate or significantly interfere with federal policies." *Reed,* 488 U.S. at 327. For instance, the mere fact that a statute touches upon issues of labor law does not mean that the Court must resort to the statute of limitations contained in § 10(b) of the NLRA. Thus, in *Eichleay Corp. v. Intern. Ass'n of Bridge, Structural and Orna-*

mental Iron Workers, 944 F.2d 1047 (3d Cir. 1991), we applied a state statute of limitations for vacating arbitration awards to an action to enforce an arbitration awards pursuant to § 301 of the Labor Management Relations Act, 29 U.S.C. § 185. Similarly, in *Brenner v. Local 514, United Brothers of Carpenters,* 927 F.2d 1283 (3d Cir. 1991), we remanded the case to the district court to apply the most closely analogous state statute of limitations to a § 301 claim of retaliation against internal union activities. In *Grasty v. Amalgamated Clothing & Textile Workers Union,* 828 F.2d 123 (3d Cir. 1987), *cert. denied,* 484 U.S. 1042 (1988), we applied Pennsylvania's four-year breach of contract statute of limitations to a union member's claim that the union failed to rebate dues and improperly charged disabled workers. In this case, as in those, the federal statute may be borrowed only if it clearly provides a closer analogy than the available state statutes. Answering this question requires us to focus on the respective policies behind the NLRA and WARN.

The primary purpose of the NLRA is "to protect the right of workers to join together in labor organizations and collectively bargain for the terms and conditions of employment." *United Paperworkers,* 999 F.2d at 54; *see also Fort Halifax Packing Co., Inc. v. Coyne,* 482 U.S. 1, 20-21 (1987). The statute "is concerned with ensuring an equitable bargaining process, not with the substantive terms that may emerge from such bargaining." *Fort Halifax,* 482 U.S. at 20 (*citing Metropolitan Life Ins. Co. v. Massachusetts,* 471 U.S. 724 (1985)). More specifically, as the Supreme Court noted in *Reed,* the NLRA has "effects upon the formation and operation of the collective-bargaining agreement between the employer and the bargaining representative, and upon the private settlement of disputes under that agreement through grievance-and-arbitration procedures". *Reed,* 488 U.S. at 329. The NLRA, then, is concerned with the importance and integrity of a process. From the NLRA's perspective,

"minimum terms of employment" that may arise from another federal statute—or from the process of collective bargaining itself—are irrelevant so long as the process is fair.

The six-month statute of limitations set forth in § 10(b) represents Congress's view of the proper balancing of the various interests involved in the process of collective bargaining. The six-month period takes into account "the national interests in stable bargaining relationships and finality of private setlements, and an employee's interest in setting aside what he views as an unjust settlement under the collective-bargaining system." *DelCostello*, 462 U.S. at 171 (*quoting United Parcel Service, Inc. v. Mitchell*, 451 U.S. at 70-71 (1980) (opinion concurring in the judgment)). In *DelCostello* itself, it was precisely this direct effect on the collective bargaining process that led the Court to invoke the § 10(b) statute of limitations. That case involved a § 301 hybrid suit (1) against an employer for breach of a collective bargaining agreement pursuant to the NLRA, and (2) against a labor union for breach of the duty of fair representation. Such a hybrid action really alleges that the process of collective bargaining has broken down. Thus, the NLRA policies applied: "The employee's interest in setting aside the 'final and binding' determination of a grievance through the method established by the collective-bargaining agreement unquestionably implicates 'those consensual processes that federal labor law is chiefly designed to promote —the formation of the . . . agreement and the private settlement of disputes under it.'" *DelCostello*, 462 U.S. at 171 (*quoting Mitchell*, 451 U.S. at 70-71 (opinion concurring in judgment)).

In *DelCostello*, the parallels between the cause of action and the policies behind the NLRA were unmistakable. In *Reed*, however, the Supreme Court, while acknowledging that many employment-related statutes affecting labor will in some way affect the collective bargaining process,

cautioned that even plausible "tangential and remote" effects upon collective bargaining are insufficient to warrant departure from the general rule. *Reed*, 488 U.S. at 330, 331. Thus, the Court refused to borrow the § 10(b) NLRA statute of limitations to govern a union member's free speech claim against the union.

WARN falls into this latter category—any effects it has on collective bargaining are tangential at best. The benefits of WARN accrue not only to unionized workers but to all workers alike. WARN, like dozens of other employment statutes which bestow substantive rights simply "gives employees something for which they otherwise might have to bargain." *Fort Halifax*, 482 U.S. at 21 (addressing Maine plant closing law). That is why in that case, the Supreme Court held that the NLRA did not preempt a Maine statute providing protection to workers from plant closings. Unlike the NLRA, the Maine regulation "provide[d] protection to individual union and non-union workers alike, and thus 'neither encourage[d] nor discourage[d] the collective bargaining processes . . . .'" *Fort Halifax*, 482 U.S. at 21 (*quoting Metropolitan Life*, 471 U.S. at 755). The WARN protections, like the Maine plant closing law discussed in *Fort Halifax*, is also properly understood as establishing part of the "backdrop" of rights that the parties bring to the collective bargaining table, and not as affecting the substantive rights that may emerge from the collective bargaining discussions. *Fort Halifax*, 482 U.S. at 21.

WARN serves a broader purpose as well, that goes beyond the employer-employee relationship addressed by the NLRA. The statute mandates that employers planning a plant closing or mass lay-off must notify the "chief elected official of the unit of local government within which such closing or layoff is to occur". 29 U.S.C. § 2102(a)(2). Employers who fail to comply with the provision are subject to civil penalties of $500 per day. 29 U.S.C. § 2104(a)(3). Thus, WARN serves very broad societal goals—to protect workers, their fami-

lies and their communities in the wake of potentially harmful employment decisions. Its remedial nature really has very little to do with the day to day process of collective bargaining.

To be sure, it cannot be said that WARN has *no* effect on collective bargaining. The companies point out, for example, that under the NLRA, an employer must provide notice to represented workers, in order to give the workers the opportunity for meaningful bargaining. *See, e.g. First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681 (1981). This fact does present a superficial resemblance between the NLRA and WARN, but on closer inspection, it highlights the difference. The rights bestowed by the NLRA focus solely on the need for a meaningful collective bargaining process; WARN provides an across-the-board substantive right. The implementing regulations of the statute highlight this crucial distinction by providing that "[c]ollective bargaining agreements may be used to clarify or [to] amplify the terms and conditions of WARN, but *may not reduce WARN rights.*" 20 C.F.R. § 639.1(g) (emphasis added). In other words, the NLRA requires notice to protect the meaningfulness of the collective-bargaining process; WARN's purpose is to substantively protect employees and their communities.

The fact that courts have looked to NLRA cases in interpreting WARN, and the fact that there are some definitional overlaps, does not change this fundamental distinction between the two statutes. At best, WARN has a family resemblance to the NLRA. In *Brenner v. Local 514, United Brothers of Carpenters*, 927 F.2d 1283 (3d Cir. 1991), we rejected the proposition that a family resemblance is sufficient to justify adopting the § 10(b) statute of limitations. There, we held that a claim against a union for breach of the duty of fair representation, while having some effect upon the collective bargaining atmosphere, did not have an effect sufficient

enough to counsel adoption of the federal statute. *Id.* at 1295. In order to justify departing from the general rule, the analogy must be more direct.[2]

As the Second Circuit pointed out in *United Paperworkers*, courts adopting the section 10(b) statute of limitations for WARN actions "have failed to grasp this crucial distinction between statutes which specifically regulate the collective bargaining relationship and those which remain peripheral to that concern." *United Paperworkers*, 999 F.2d at 55.

Nonetheless, despite the vast gulf between the respective policies behind the NLRA and WARN, the companies look for relief in our own prior decision of *Haggerty v. USAir*. Their reliance is misplaced. That case addressed the Employee Protection Program of the Airline Deregulation Act, 49 U.S.C. § 1552(d)(1) (1988) ("EPP"), a federal statute which provided certain air carrier employees with a right of first hire against other air carriers. The EPP directly affected the collective bargaining environment by impacting on "the seniority relationships of other employees . . . ." *Haggerty*, 952 F.2d at 787. As in *DelCostello*, this direct impact on the collective bargaining environment required a statute of limitations that furthered the need for the rapid resolution of labor disputes. And since, as we noted in *Haggerty* itself, the air-

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[2] The lack of similarity between the NLRA and WARN becomes even starker when one looks at the remedies afforded by the respective statutes. Under the NLRA, the National Labor Relations Board has broad discretion to " 'take such affirmative action including reinstatement of employees . . . as will effectuate the policies of [the Act]' to remedy an employer's unfair labor practices." *Tubari Ltd., Inc. v. NLRB*, 959 F.2d 451, 453 (3d Cir. 1992). WARN by its very terms precludes such broad equitable relief: "[A] Federal court shall *not* have authority to enjoin a plant closing or mass layoff." (emphasis added). Similarly, the NLRB's discretion in awarding back pay is broad. *See Tubari*, 959 F.2d at 453. WARN, though, provides a strict statutory mechanism for computing damages.

line industry was nearly 90% unionized and the right-to-hire program was inserted into the statute at the insistence of unions, the six-month section 10(b) statute of limitations was the obvious choice.[3]

In determining whether to apply a federal statute of limitations, we also have considered whether the federal policies at stake and the practicalities of litigation make the NLRA statute "a significantly more appropriate vehicle for interstitial lawmaking". *DelCostello*, 462 U.S. at 172; *Haggerty*, 952 F.2d at 786. The companies argue that WARN requires a single federal statute of limitations, because subjecting the companies to multiple state statutes of limitations would make it difficult for employers to calculate their contingent liabilities.

This case simply does not present serious uniformity concerns. The need for uniformity becomes real only when the federal statute at issue contains numerous types of claims and legal theories or when the prospect of multiple state statutes of limitation presents serious practical problems. Uniformity concerns motivated the Supreme Court in *Wilson v. Garcia*, 471 U.S. 261 (1985), to apply a uniform limitations period (a state limitations period in that case) to claims arising under 42 U.S.C. § 1983. As the Court pointed out, claims under the broad civil rights statute "would encompass numerous and diverse topics and subtopics." *Wilson*, 471 U.S. at 273. Thus, "[i]f the choice of the statute of limitations were to depend upon the particular facts or the precise legal theory of each claim, counsel could almost always argue, with considerable force, that two or more periods of limitations should apply to each § 1983 claim." *Id.* at 273-74. The Court used similar reasoning in *Agency Holding*

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[3] We also found that "as with the NLRA, the Department of Labor has had a role in administering the EPP as the agency charged with maintaining a listing of airline vacancies for the use of protected employees under the EPP." *Haggerty*, 952 F.2d at 787.

Corp. v. Malley-Duff & Associates, Inc., 483 U.S. 143 (1987): Since RICO "encompass[es] numerous diverse topics and subtopics . . . a uniform statute of limitations is required to avoid intolerable 'uncertainty and time-consuming litigation.'" *Id.* at 149-50 (*quoting Wilson*, 471 U.S. at 273, 272).

In *Haggerty*, we relied on uniformity concerns in deciding to apply the section 10(b) statute. Under the EPP, a protected employee who had been terminated or furloughed could claim a right of first hire with *any other carrier* that was hiring employees. We noted that airline carriers would have difficulty "managing a cohesive policy with respect to the EPP were they subject to the varying limitations periods of each of the states in which they operate." *Haggerty*, 952 F.2d at 786. Thus, without a uniform federal statute of limitations, the entire airline industry faced constant and protracted uncertainty.

Unlike RICO and Section 1983, WARN contains but a single cause of action, and all WARN claims involve nearly identical fact patterns and discrete inquiries. And unlike the EPP, under which an airline may be the fortuitous victim of events involving other air carriers all across the country, WARN's obligations simply do not implicate such geographic concerns favoring uniformity. As the Second Circuit put it:

> "The term 'plant closing' as defined by the Act is limited to single sites of employment, and venue is limited to the district where the violation is alleged to have occurred or where the employer does business; unless a single plant site straddles the boundary between two states, it is unlikely prospective plaintiffs will have a broad choice of fora in which to bring their claims or that doubt will arise as to in which state triggering events occurred. Therefore, geographic considerations do not counsel for the application of a uniform federal limitations period for

> WARN Act claims." *United Paperworkers*, 999 F.2d at 56 (quoting district court opinion).

Because of these same factors, "courts will have little difficulty in determining which state's law to apply and workers will gain few advantages by suing in a court far from the site of injury." *United Paperworkers*, 999 F.2d at 56.[4]

The companies' further concern about the effect of a plant closing on service of process, and on the mechanics of litigation, simply do not implicate federal concerns; rather, they are the same concerns at issue in every cause of action, whenever the statute of limitations is longer then a year or so.

On the other hand, a short statute of limitations could very well frustrate the policies behind WARN. As the Second Circuit found, under the complex administrative scheme of the NLRA, in which the NLRB plays a large and active role in prosecuting claims, "[t]he burden on complainants in pursuing a claim is minimal, justifying the short statute of limitations." *United Paperworkers*, 999 F.2d at 55. WARN does not contain those administrative safeguards, and a six-month statute could very well constitute too great a burden on the claimants.

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[4] Since the *Crown Cork & Seal* action occurred in Perry, Georgia, there is a question as to whether the statute of limitations should be borrowed from Georgia or Pennsylvania law. We have previously held that "as a general rule the governing statute of limitations should be that of the state in which the federal court sits, unless a party can make a compelling showing that the application of that statutory time bar would seriously frustrate federal labor policy or work severe hardship to the litigants." *Consolidated Express, Inc. v. New York Shipping Associaiton, Inc.*, 602 F.2d 494, 507-08 (3d Cir. 1979), *vacated on other grounds*, 448 U.S. 902 (1980). We need not decide whether the statute of limitations should be borrowed from Pennsylvania or Georgia law, since no party has brought to the lower courts' attention a statute of limitations, from either state, under which the instant acions would be untimely.

Finally, cases finding that the practicalities of litigation favor adoption of a federal statute of limitations have focused on the problems with the potential state statutes. For example, in *DelCostello*, the Court pointed out that the two possible state statutes were inconsistent with the relevant federal policy favoring the finality of settlements and the opportunity to attack an unfair result under collective bargaining. The extremely short time periods in state arbitration statutes "fail to provide an aggrieved employee with a satisfactory opportunity to vindicate his rights under § 301 and the fair representation doctrine." *Id.* at 166. Conversely, the relatively lengthy time period governing legal malpractice claims "would preclude the relatively rapid final resolution of labor disputes favored by federal law—a problem not present when a party to a commercial arbitration sues his lawyer." *Id.* at 168.

Here, the state statutes of limitations brought to the lower courts' attention—which range from the two-year period for enforcing civil penalties under 42 Pa. Cons. Stat. Ann. § 5524(5) to Pennsylvania's six-year residual statute of limitations, 42 Pa. Cons. Stat. Ann. § 5527—do not interfere with federal policy.[5] Because of WARN's remedial nature and its limited effect on collective bargaining, a short statute of limitations is unnecessary. And none of the state statutes are so short as to interfere with a worker's potential for seeking or gaining relief. While we acknowledge that none of the possible state laws provide perfect analogies to WARN, the absence of a perfect analogy is an insufficient reason to depart from the general rule, particularly when federal law does not provide a satisfactory alternative. *See, e.g., DelCostello*, 462 U.S. at 171; *Gavalik v. Continental Can Co.*, 812 F.2d 834, 847 (3d Cir. 1987).

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[5] Other possible state statutes of limitations include the three year period set forth in 43 Pa. Stat. Ann. § 260.9a(g) for bringing claims under the Pennsylvania Wage Payment and Collection Law, and the four year limitations periods for breach of an implied contract, 42 Pa. Cons. Stat. Ann. § 5525(4).

Here, we need not decide which state statute applies, since the actions would be timely under any of the possible statutes of limitations brought to the court's attention.

Conclusion

We conclude that, for the reasons detailed above, for actions arising under WARN, courts must apply the most closely analogous state statute of limitations. We therefore will affirm the district court's Order in *United Steelworkers of America v. Crown Cork & Seal* denying Crown Cork & Seal's motion for summary judgment. We will reverse the Order of the district court in *Thomas v. North Star Steel* granting North Star's motion for summany judgment in favor of North Star. These cases will be remanded to the respective district courts for further proceedings consistent with this opinion. Costs taxed against the appellant in 93-2008. Costs taxed against the appellee in 93-7613.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

[Filed Aug. 25, 1993]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

Civil Action No. 92-5968

UNITED STEELWORKERS OF AMERICA, AFL-CIO/CLC

v.

CROWN CORK & SEAL CO., INC.

Memorandum

O'Neill, J. August 24, 1993

On October 15, 1992, plaintiff United Steelworkers of America, AFL-CIO/CLC ("USW"), filed a complaint seeking declaratory and monetary relief from defendant Crown, Cork & Seal Co., Inc. ("CC & S"). Plaintiff "is the exclusive collective bargaining representative unit composed of certain" workers employed by defendant's company. *See* Complaint at ¶.3. Defendant is a national corporation with headquarters located in Philadelphia. It employed more than 100 employees at its plant in Perry, Georgia. *Id.* at ¶.4.

In its complaint, plaintiff alleges that defendant's termination of about approximately 85 employees at its Perry plant on or about September 30, 1991, violated the provisions of the Worker Adjustment and Retraining Act (the "WARN Act"), 29 U.S.C. § 2101 *et seq.* Es-

sentially, plaintiff contends that defendant violated section 3(a) of the WARN Act by failing to notify the USW of its mass layoff plans at least 60 days before the layoff. *See* Complaint at ¶.12.

Currently before the Court is defendant's motion for summary judgment. Defendant contends that plaintiff's cause of action is barred by the applicable statute of limitations. As demonstrated by counsels' presentations at oral argument on May 20, 1993, and subsequent correspondence regarding recent decisions on the WARN Act's statute of limitations, the question before the Court is topical. Because I agree with the reasoning of the Court of Appeals for the Second Circuit in *United Paperworkers v. Specialty Paperboard, Inc.*, 1993 U.S. App. LEXIS 18608 (2d Cir. July 19, 1993), I reject defendant's arguments and therefore deny its motion for summary judgment.

WARN requires companies with one hundred or more employees to provide workers with at least sixty-days' written notice before a mass layoff or plant closing.[1] A company that fails to provide such notice prior to a mass layoff or plant closing may be sued in federal court by employees who suffer an employment loss for backpay and benefits for each day of violation. *See United Paperworkers*, 1993 U.S. App. LEXIS 18608 at *3-*4 (canvassing WARN statute).

WARN does not include an express statute of limitations. Defendant asserts that the six-month statute of limitations contained in section 10(b) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 160(b), is the appropriate limitations period. Plaintiff argues that this Court should apply a state limitations period.

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[1] "While a termination immediately qualifies as an employment loss, 29 U.S.C. § 2101(a)(6)(A), a layoff must last more than six months to qualify. 29 U.S.C. § 2101(a)(6)(B)." *United Paperworkers v. Specialty Paperboard, Inc.*, 1993 U.S. App. LEXIS 18608 at *3.

Both parties agree that the starting point for this court's inquiry is *DelCostello v. Teamsters*, 462 U.S. 151 (1983). In *DelCostello*, the Court held that the six-month period in section 10(b) of the NLRA applies when an employee sues both an employer for breach of a collective bargaining agreement and a union for breach of its duty of fair representation for mishandling the ensuing grievance or arbitration proceedings.

The Court set out the law governing the determination of a limitations period for a federal civil statute in the absence of an express period. Writing for the Court, Justice Brennan stated that "[i]n such situations . . . [w]e have generally concluded that Congress intended that the Courts apply the most closely analogous statute of limitations under state law." *Id.* at 158.

However, as the Court noted, sometimes "state statutes of limitations can be unsatisfactory vehicles for enforcement of federal law." *Id.* at 161. In these situations, the Court borrows limitations periods from related federal statutes or employs an alternative such as laches. *Id.* at 162. It then reasoned that the six-month period in section 10(b) of the NLRA provided a better analogy than any state statute in formulating a limitations period for an employee's "hybrid § 301/fair representation claim." *Id.* at 165.

The Court concluded:

> We stress that our holding today should not be taken as a departure from prior practice in borrowing limitations periods for federal causes of action, in labor law or elsewhere. We do not mean to suggest that federal courts should eschew use of state limitations periods anytime state law fails to provide a perfect analogy. On the contrary, as the courts have often discovered, there is not always an obvious state-law choice for application to a given federal cause of action; yet resort to state law remains the norm for borrowing of limitations periods. Nevertheless, when

> a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking, we have not hesitated to turn away from state law.

Id. at 171-172.

The Court affirmed its commitment to the principles set out in *DelCostello* in *Reed v. Transportation Union*, 488 U.S. 319 (1989). In *Reed*, the Court was required to determine the proper limitations period for a union member's suit against the union and its officers under § 101(a)(2) of Title I of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA") for violation of his free speech rights. The Court held that state general or residual personal injury statutes provided the proper limitations period.[2]

Although the Supreme Court revisited the question of how to determine the appropriate limitations time for a civil federal statute that lacks an express period after *Reed*, Justice Blackmun's reformulation of the judicial inquiry did not command a majority of the Court. *See Lampf, Pleva Lipkind, et al. v. Gilbertson*, 111 S.Ct. 2773, 2778-2779 (distilling "hierarchical inquiry for ascertaining the appropriate limitations period") (1991).[3]

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[2] The Court concluded: "Because § 101(a)(2) of the LMRDA is modeled on the First Amendment to our Constitution, there is an analogy between § 101(a)(2) claims, § 1983 claims, and state personal injury actions. . . . The well-established rule that statutes of limitation for federal causes of action not supplied with their own limitations periods will be borrowed from state law thus requires that state general or residual personal injury statutes be applied to § 101(a)(2) suits." *Reed v. Transportation Union*, 488 U.S. at 334.

[3] Justice Scalia did not join this part of Justice Blackmun's opinion. *See Lampf, Pleva Lipkind, et al. v. Gilbertson*, 111 S.Ct. at 2783 (Scalia, J., concurring in part and concurring in the judgment).

The Court of Appeals for the Third Circuit has conducted the inquiry required by *DelCostello* in a number of cases. It has applied state and federal limitations periods in those cases. *Compare Service Employees International v. City Cleaning Co., Inc.*, 982 F.2d 89 (3d Cir. 1992) (applying Pennsylvania law when deciding limitations period for union's suit to enforce a grievance committee's award under § 301 of the Federal Labor Management Relations Act of 1947) with *Haggerty v. USAir, Inc.*, 952 F.2d 781 (3d Cir. 1992) (holding that claims under the Employee Protection Program of the Airline Deregulation Act of 1978 are governed by § 10(b) of the NLRA).

As the parties have informed this Court, there are cases going both ways on the question of whether state law or § 10(b) of the NLRA provides the appropriate limitations period for a civil suit under WARN.

Cases holding that state law furnishes the correct period include *United Paperworkers v. Specialty Paperboard, Inc.*, 1993 U.S. App. LEXIS 18608 (2d Cir. July 19, 1993) (adopting Vermont statute of limitations for contract claims); *Frymire v. Ampex Corp.*, 821 F. Supp. 651 (D.Col. 1993) (adopting Colorado statute of limitations for contract claims); *Wallace v. Detroit Coke Corp.*, 818 F.Supp. 192 (E.D.Mi. 1993) (adopting Michigan statute of limitations for contract claims); *Automobile Mechanics' Local No. 701 v. Santa Fe Terminal Services, Inc.*, 1993 U.S. Dist. LEXIS 5859 (N.D.Ill. May 3, 1993) (declining to use § 10(b) of the NLRA but not specifying state statute from which to borrow).

Cases holding that section 10(b) of the NLRA provides the proper limitations period include *News. Deliverers v. United Magazine Co.*, 809 F.Supp. 185 (E.D.N.Y. 1992), *Order granting motion for entry of judgment granted*, 1993 U.S. Dist. LEXIS 11087 (E.D.N.Y. April 10, 1993); *Staudt v. Glastron, Inc.*, 1993 US. Dist.

LEXIS 3090 (W.D.Tex. February 22, 1993); *Thomas v. North Star Steel Co., Inc.*, No. 4:CV-92-1507 (M.D. Pa. May 25, 1993).

Without recounting the discussion of the Court of Appeals for the Second Circuit in *United Paperworkers*, I follow the reasoning of the Court in that case and conclude that Pennsylvania law provides the appropriate limitations period for civil suits under the WARN Act. Neither party cites a possible analogous state statute that is shorter than two years. Because plaintiff filed its complaint less than two years before defendant's alleged termination of employees at its Perry plant, the Court does not have to determine the particular Pennsylvania statute from which to borrow. *See, e.g., Automobile Mechanics' Local No. 701*, 1993 U.S. Dist. LEXIS 5859 at * 18.

APPENDIX C

[Filed Aug. 25, 1993]

IN THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 92-5968

UNITED STEELWORKERS OF AMERICA, AFL-CIO/CLC

v.

CROWN CORK & SEAL CO., INC.

ORDER

AND NOW, this 24 day of August, 1993, upon consideration of defendant's motion for summary judgment, the supporting and opposing memoranda thereto and the transcript of the oral argument conducted on May 20, 1993, it is hereby ORDERED that defendant's motion for summary judgment is DENIED.

/s/ Thomas N. O'Neill, Jr.
THOMAS N. O'NEILL, JR.
J.

APPENDIX D

[Filed Sep. 19, 1993]

IN THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 92-CV-5968

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Plaintiff,

v.

CROWN CORK & SEAL CO., INC.,
Defendant.

ORDER

AND NOW, this 16 day of Sept., 1993, upon consideration of defendant Crown Cork & Seal Co., Inc.'s Motion for Certification for Interlocutory Appeal Pursuant to 28 U.S.C. § 1292(b), and the response thereto, the Court hereby certifies that its ORDER dated August 24, 1993 denying defendant's motion for summary judgment involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.

BY THE COURT:

/s/ Thomas N. O'Neill, Jr.
THOMAS N. O'NEILL, JR.
U.S.D.J.

[Entered 9/17/93]

APPENDIX E

STATUTES INVOLVED

WORKER ADJUSTMENT AND RETRAINING NOTIFICATION

§ 2101. Definitions; exclusions from definition of loss of employment

(a) Definitions

As used in this chapter—

(1) the term "employer" means any business enterprise that employs—

(A) 100 or more employees, excluding part-time employees; or

(B) 100 or more employees who in the aggregate work at least 4,000 hours per week (exclusive of hours of overtime);

(2) the term "plant closing" means the permanent or temporary shutdown of a single site of employment, or one or more facilities or operating units within a single site of employment, if the shutdown results in an employment loss at the single site of employment during any 30-day period for 50 or more employees excluding any part-time employees;

(3) the term "mass layoff" means a reduction in force which—

(A) is not the result of a plant closing; and

(B) results in an employment loss at the single site of employment during any 30-day period for—

(i)(I) at least 33 percent of the employees (excluding any part-time employees); and

(II) at least 50 employees (excluding any part-time employees); or

(ii) at least 500 employees (excluding any part-time employees);

(4) the term "representative" means an exclusive representative of employees within the meaning of section 159(a) or 158(f) of this title or section 152 of title 45;

(5) the term "affected employees" means employees who may reasonably be expected to experience an employment loss as a consequence of a proposed plant closing or mass layoff by their employer;

(6) subject to subsection (b) of this section, the term "employment loss" means (A) an employment termination, other than a discharge for cause, voluntary departure, or retirement, (B) a layoff exceeding 6 months, or (C) a reduction in hours of work of more than 50 percent during each month of any 6-month period;

(7) the term "unit of local government" means any general purpose political subdivision of a State which has the power to levy taxes and spend funds, as well as general corporate and police powers; and

(8) the term "part-time employee" means an employee who is employed for an average of fewer than 20 hours per week or who has been employed for fewer than 6 of the 12 months preceding the date on which notice is required.

(b) Exclusions from definition of employment loss

(1) In the case of a sale of part or all of an employer's business, the seller shall be responsible for providing notice for any plant closing or mass layoff in accordance with section 2102 of this title, up to and including the effective date of the sale. After the effective date of the sale of part or all of an employer's business, the

purchaser shall be responsible for providing notice for any plant closing or mass layoff in accordance with section 2102 of this title. Notwithstanding any other provision of this chapter, any person who is an employee of the seller (other than a part-time employee) as of the effective date of the sale shall be considered an employee of the purchaser immediately after the effective date of the sale.

(2) Notwithstanding subsection (a)(6) of this section, an employee may not be considered to have experienced an employment loss if the closing or layoff is the result of the relocation or consolidation of part or all of the employer's business and, prior to the closing or layoff—

(A) the employer offers to transfer the employee to a different site of employment within a reasonable commuting distance with no more than a 6-month break in employment; or

(B) the employer offers to transfer the employee to any other site of employment regardless of distance with no more than a 6-month break in employment, and the employee accepts within 30 days of the offer or of the closing or layoff, whichever is later.

§ 2102. Notice required before plant closings and mass layoffs

(a) Notice to employees, State dislocated worker units, and local governments

An employer shall not order a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice of such an order—

(1) to each representative of the affected employees as of the time of the notice or, if there is no such representative at that time, to each affected employee; and

(2) to the State dislocated worker unit (designated or created under title III of the Job Training Partnership Act [29 U.S.C. 1651 et seq.]) and the chief elected official of the unit of local government within which such closing or layoff is to occur.

If there is more than one such unit, the unit of local government which the employer shall notify is the unit of local government to which the employer pays the highest taxes for the year preceding the year for which the determination is made.

(b) Reduction of notification period

(1) An employer may order the shutdown of a single site of employment before the conclusion of the 60-day period if as of the time that notice would have been required the employer was actively seeking capital or business which, if obtained, would have enabled the employer to avoid or postpone the shutdown and the employer reasonably and in good faith believed that giving the notice required would have precluded the employer from obtaining the needed capital or business.

(2)(A) An employer may order a plant closing or mass layoff before the conclusion of the 60-day period if the closing or mass layoff is caused by business circumstances that were not reasonably foreseeable as of the time that notice would have been required.

(B) No notice under this chapter shall be required if the plant closing or mass layoff is due to any form of natural disaster, such as a flood, earthquake, or the drought currently ravaging the farmlands of the United States.

(3) An employer relying on this subsection shall give as much notice as is practicable and at that time shall give a brief statement of the basis for reducing the notification period.

(c) Extension of layoff period

A layoff of more than 6 months which, at its outset, was announced to be a layoff of 6 months or less, shall be treated as an employment loss under this chapter unless—

(1) the extension beyond 6 months is caused by business circumstances (including unforeseeable changes in price or cost) not reasonably foreseeable at the time of the initial layoff; and

(2) notice is given at the time it becomes reasonably foreseeable that the extension beyond 6 months will be required.

(d) Determinations with respect to employment loss

For purposes of this section, in determining whether a plant closing or mass layoff has occurred or will occur, employment losses for 2 or more groups at a single site of employment, each of which is less than the minimum number of employees specified in section 2101(a)(2) or (3) of this title but which in the aggregate exceed that minimum number, and which occur within any 90-day period shall be considered to be a plant closing or mass layoff unless the employer demonstrates that the employment losses are the result of separate and distinct actions and causes and are not an attempt by the employer to evade the requirements of this chapter.

§ 2103. Exemptions

This chapter shall not apply to a plant closing or mass layoff if—

(1) the closing is of a temporary facility or the closing or layoff is the result of the completion of a particular project or undertaking, and the affected employees were hired with the understanding that their employment was limited to the duration of the facility or the project or undertaking; or

(2) the closing or layoff constitutes a strike or constitutes a lockout not intended to evade the requirements of this chapter. Nothing in this chapter shall require an employer to serve written notice pursuant to section 2102(a) of this title when permanently replacing a person who is deemed to be an economic striker under the National Labor Relations Act [29 U.S.C. 151 et seq.]: *Provided,* That nothing in this chapter shall be deemed to validate or invalidate any judicial or administrative ruling relating to the hiring of permanent replacements for economic strikers under the National Labor Relations Act.

§ 2104. Administration and enforcement of requirements

(a) Civil actions against employers

(1) Any employer who orders a plant closing or mass layoff in violation of section 2102 of this title shall be liable to each aggrieved employee who suffers an employment loss as a result of such closing or layoff for—

(A) back pay for each day of violation at a rate of compensation not less than the higher of—

(i) the average regular rate received by such employee during the last 3 years of the employee's employment; or

(ii) the final regular rate received by such employee; and

(B) benefits under an employee benefit plan described in section 1002(3) of this title, including the cost of medical expenses incurred during the employment loss which would have been covered under an employee benefit plan if the employment loss had not occurred.

Such liability shall be calculated for the period of the violation, up to a maximum of 60 days, but in no event for more than one-half the number of days the employee was employed by the employer.

(2) The amount for which an employer is liable under paragraph (1) shall be reduced by—

(A) any wages paid by the employer to the employee for the period of the violation;

(B) any voluntary and unconditional payment by the employer to the employee that is not required by any legal obligation; and

(C) any payment by the employer to a third party or trustee (such as premiums for health benefits or payments to a defined contribution pension plan) on behalf of and attributable to the employee for the period of the violation.

In addition, any liability incurred under paragraph (1) with respect to a defined benefit pension plan may be reduced by crediting the employee with service for all purposes under such a plan for the period of the violation.

(3) Any employer who violates the provisions of section 2102 of this title with respect to a unit of local government shall be subject to a civil penalty of not more than $500 for each day of such violation, except that such penalty shall not apply if the employer pays to each aggrieved employee the amount for which the employer is liable to that employee within 3 weeks from the date the employer orders the shutdown or layoff.

(4) If an employer which has violated this chapter proves to the satisfaction of the court that the act or omission that violated this chapter was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of this chapter the court may, in its discretion, reduce the amount of the liability or penalty provided for in this section.

(5) A person seeking to enforce such liability, including a representative of employees or a unit of local government aggrieved under paragraph (1) or (3), may sue either for such person or for other persons similarly situated, or both, in any district court of the United States

for any district in which the violation is alleged to have occurred, or in which the employer transacts business.

(6) In any such suit, the court, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs.

(7) For purposes of this subsection, the term,[1] "aggrieved employee" means an employee who has worked for the employer ordering the plant closing or mass layoff and who, as a result of the failure by the employer to comply with section 2102 of this title, did not receive timely notice either directly or through his or her representative as required by section 2102 of this title.

(b) Exclusivity of remedies

The remedies provided for in this section shall be the exclusive remedies for any violation of this chapter. Under this chapter, a Federal court shall not have authority to enjoin a plant closing or mass layoff.

§ 2105. Procedures in addition to other rights of employees

The rights and remedies provided to employees by this chapter are in addition to, and not in lieu of, any other contractual or statutory rights and remedies of the employees, and are not intended to alter or affect such rights and remedies, except that the period of notification required by this chapter shall run concurrently with any period of notification required by contract or by any other statute.

§ 2106. Procedures encouraged where not required

It is the sense of Congress that an employer who is not required to comply with the notice requirements of section 2102 of this title should, to the extent possible, provide notice to its employees about a proposal to close a plant or permanently reduce its workforce.

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[1] So in original. The comma probably should not appear.

§ 2107. Authority to prescribe regulations

(a) The Secretary of Labor shall prescribe such regulations as may be necessary to carry out this chapter. Such regulations shall, at a minimum, include interpretative regulations describing the methods by which employers may provide for appropriate service of notice as required by this chapter.

(b) The mailing of notice to an employee's last known address or inclusion of notice in the employee's paycheck will be considered acceptable methods for fulfillment of the employer's obligation to give notice to each affected employee under this chapter.

§ 2108. Effect on other laws

The giving of notice pursuant to this chapter, if done in good faith compliance with this chapter, shall not constitute a violation of the National Labor Relations Act [29 U.S.C. 151 et seq.] or the Railway Labor Act [45 U.S.C. 151 et seq.].

§ 2109. Report on employment and international competitiveness

Two years after August 4, 1988, the Comptroller General shall submit to the Committee on Small Business of both the House and Senate, the Committee on Labor and Human Resources, and the Committee on Education and Labor a report containing a detailed and objective analysis of the effect of this chapter on employers (especially small- and medium-sized businesses), the economy (international competitiveness), and employees (in terms of levels and conditions of employment). The Comptroller General shall assess both costs and benefits, including the effect on productivity, competitiveness, unemployment rates and compensation, and worker retraining and readjustment.